The facts in action No. 3 are as follows. The defendant built a house on the Kuala Muda Estate with the then owner's permission. The chief clerk of the plaintiff, the present owner, said that the house was built during the state of emergency which we all know was declared on 12th July, 1948, G.N. 1921 of 1948, (therefore by inference after 31st January, 1948 and its occupant is not protected by the Control of Rent Ordinance No. 2 of 1956) but under cross-examination he said that it was built in 1946 or 1947. The defendant said that it was built in March 1946. The learned President wrote his grounds on the basis that the house was subject to the Ordinance and I proceed on the assumption that he had made a definite finding of fact that the house had not been completed after 31st January, 1948 and is therefore subject to the Ordinance.

The defendant was 13 in 1946 but nevertheless the learned President accepted his story that as he was a contractor working for the estate, he was allowed to occupy the ground on which stood the house rent free (there was no dispute that he was not asked to pay rent and he paid no rent) and he was exempted from paying rent because of his service to the estate as a contractor.

The plaintiff's case is that the defendant is a mere licensee and his licence having been terminated by two notices he the plaintiff is entitled to possession.

The learned President rejected the plaintiff's claim on the ground that there was a relationship of landlord and tenant and the tenant is protected by the Ordinance.

On consideration of this matter I must allow this appeal.

It is true that the reservation of rent is not essential to a tenancy, note (c) on page 407 of *Halsbury's Laws*, 3rd edition, volume 23, but nevertheless it has to be decided whether there was any evidence here upon which a tenancy between the original owner of the estate and the defendant could be inferred. In my opinion there was no such evidence. Whether or not parties intend to create as between themselves the relationship of landlord and tenant, under which an estate is created in the tenant and certain mutual obligations arise by implication of law, must in the last resort be a question of intention. Where the parties enter into a formal document the intention to enter into a formal legal relationship is obvious. But there is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind, *Booker* v. *Palmer* [1]. Here this mere boy was soon after the Japanese surrender permitted to build on the estate where he was then or later became a contractor and he was not asked to pay rent. No doubt it was to the mutual advantage of both parties that he should be readily available when required particularly at a time when estate owners were anxious to rehabilitate their property after the neglect of the war years. In these circumstances I do not think that it would be proper to infer that the intention of the parties was to create the relationship of landlord and tenant. The facts in favour of the alleged tenant in *Kuppu* v. *Brown & Anor.* [2] are stronger than the facts here and yet there the Court of Appeal held that he was only a licensee.

True that in the first notice served on the defendant the plaintiff described the relationship between him and the defendant as one of "ground tenancy" but this does not in my view estop the plaintiff from offering the explanation that the defendant is only a licensee, see *Kuppu's* case [2] again.

Service of the summons and statement of claim in the Sessions Court is in itself a notice of termination of the licence, *Tool Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* [3] and *Saraswathy Ammal and another* v. *Oriental Bank of Malaya Ltd.* [4]

The defendant's licence having been properly terminated, the plaintiff is entitled to vacant possession.

The facts in action No. 4 are identical except that the defendant was a mature adult when he built his house on the estate. He also was a contractor for the estate and was permitted to build and built on the estate, he was not asked to pay rent and he paid no rent. Here too in my opinion the defendant was only a mere licensee and his licence having been properly terminated there shall be judgment for the plaintiff.

In both cases the defendants shall give up to the plaintiff possession of that portion of the land on which each of their houses stands and they shall pay costs in the Court below and here.

Judgment for the plaintiff.

Solicitors: *Pillai, Lim, Lee & Hwang; M. Abraham.*

TAM & ANOR. v. WATEH

[O.C.J. (Suffian J.) January 19, 1963]

[Alor Star — Civil Suit No. 98 of 1961]

Probate and Administration — Grant of letters of administration to defendant as lawful grandson — Objections by plaintiffs — Defendant obtaining ex parte order for distributing deceased's property — Whether plaintiffs can re-open question of defendant's status — Application for revocation of grant of letters of administration — Whether law in Kedah same as English law — Kedah Administration of Estates Enactment No. 1, s.18(iv).

Evidence — Grant of letters of administration whether conclusive evidence as regards character of administrator — Evidence of person who has special means of knowledge of relationship of two persons — Evidence Ordinance, ss.32(e), 41(2), 50(1).

The defendant was granted letters of administration to the estate of one Yunus bin Derela on November 30, 1958 despite objections by both plaintiffs. On February 4, 1959 the defendant obtained an *ex parte* order giving him leave to distribute the deceased's estate. The order was made on the basis that the defendant's father was the legitimate son of the said deceased. On March 23, 1959 letters of administration were issued to the defendant disclosing him as the lawful grandson of the deceased. The plaintiffs filed a notice of motion for the following orders, namely (i) that the letters of administration granted to the defendant be revoked and (ii) that the plaintiffs were the lawful beneficiaries entitled to share in the estate of the said deceased. It was contended for the defendant that the matter was *res judicata* and therefore not subject to review.

Held: (1) letters of administration were not granted to the defendant because he was entitled to a share in the estate of the deceased but because he was thought to be a suitable person to be granted such letters of administration under section 12(iv) of the Kedah Administration of Estates Enactment;

(2) the plaintiffs were therefore not precluded from contesting the title to the deceased's property under section 18(iv) of the Kedah Administration of Estates Enactment and the grant of letters of administration to the defendant did not preclude the court from adjudicating on the title of the different contestants to the deceased's estate. So adjudicated the plaintiffs were the lawful beneficiaries of the estate of the deceased.

Case referred to:—

(1) *In re Ivory* (1878) 10 Ch. D. 372.

The following authorities and cases were also cited in argument: *Halsbury's Laws*, 3rd ed., Vol. 15, paras. 357, 505 and 637; *English & Empire Digest*, Vol. 21, 158-9; *New Brunswick Railway Co.* v. *British and French Trust Corp. Ltd.* [1939] A.C. 1; [1938] 4 All E.R. 747; *Kalipada De and Ors.* v. *Dwijapada Das & Ors.* L.R. 57 I.A. 24; *K. Sockalinga Mudaliar* v. *S. Eliathamby & Anor.* [1952] M.L.J. 77; *Isaacs & Sons* v. *Salbstein & Anor.* [1916] 2 K.B. 139; *Badar Bee* v. *Habib Merican Noordin & Ors.* [1909] A.C. 615; *Marginson* v. *Blackburn Borough Council* [1939] 2 K.B. 426; *Johnson* v. *Cartledge and Matthews* [1939] 3 All E.R. 654; *Cooper* v. *Cooper* [1954] 3 All E.R. 359; *In re Ivory* (1878-9) 10 Ch. D. 372; *Mohan* v. *Broughton* [1899] P. 211; [1900] P. 56; *Hewson* v. *Shelly* [1914] 2 Ch. 13, 29-30; *In re Wernher* [1918] 1 Ch. 339; *Warter* v. *Warter* [1890] 15 P. 35.

CIVIL SUIT.

Mrs. B. H. Oon for the plaintiffs.

A. Jayadeva for the defendant.

Cur. Adv. Vult.

Suffian J.: The principal question here is, was Saman the illegitimate son of Munah or the legitimate son of Munah's brother Yunus bin Derela. All the three, Saman, Munah and Yunus, are deceased, but hereinafter I shall refer only to Yunus as the deceased.

The two plaintiffs say that Yunus bin Derela died childless, Saman was born out of wedlock to Munah, his father was Yunus, but another Yunus, Yunus bin Demanis, the defendant and his five brothers and sisters are Saman's children and as such they are not entitled to the deceased's estate. The defendant says that Saman was the legitimate son of the deceased and he (defendant) and his five brothers and sisters as Saman's children and the deceased's grandchildren are entitled to the deceased's estate.

Before dealing with the principal question, I must first dispose of a legal question.

It is admitted or has been proved that on 30th November, 1958 this Court, despite objections by the two plaintiffs, granted letters of administration to the defendant and on 4th February, 1959 the defendant obtained an order giving him leave to distribute the deceased's estate on the basis that Saman was the deceased's legitimate son. Inche Jayadeva submits that in view of this the matter in dispute is *res judicata* and the plaintiffs cannot reopen the question of the defendant's status.

On this preliminary point, the facts in detail, as I find them, some of them by reference to the records in the archives of this Court, are as follows.

An application for distribution was made in the Baling Land Office (the second plaintiff says the application was made by him in September 1956, the defendant says he also applied) but because it was disputed the parties were referred to this Court.

On the 1st October, 1958 the defendant petitioned this Court for letters of administration stating that he was the natural and lawful grandson and one of the next-of-kin of the deceased.

On the 6th October, 1958 the two plaintiffs formally objected to the petition on the ground that the defendant was not a lawful beneficiary.

On the 12th October, 1958 the Court wrote to both the plaintiffs asking them to put up an affidavit stating their connection with the deceased. They failed to do so.

On the 29th October, 1958, notice of hearing of petition was given by the Court.

On the 30th November, 1958, the date fixed for the hearing of the petition, the defendant appeared by counsel while the two plaintiffs appeared in person. The record of the proceedings before the learned Assistant Registrar who heard the petition was very brief. The only record made by him was as follows:—

"*Coram:* Joo Peng Lim, Asst. Registrar.

Mohd. Zahir for petitioner.

Consent of Hawa, Che Pin, Ibrahim, Saad, Dai and Tijah filed (Enclosure 2).

Present: Che Tam bin Abdullah and Puteh bin Salleh. Puteh says he is in possession of the title deeds and the three pieces of land for the last 4 years. He says petitioner is not a beneficiary and therefore not entitled to administration.

Zahir: My client, the petitioner, says these two are not beneficiaries.

L.A. granted to petitioner.

Sd. Joo Peng Lim.
30.11.58."

On the 3rd December, 1958, i.e. after the above hearing the two plaintiffs submitted a statutory declaration in which they reiterated

their claim that the defendant was not the lawful beneficiary of the deceased and that they themselves were.

On 4th February, 1959, the defendant obtained an order in Chambers from Mr. Justice Hill, giving him leave to distribute the deceased's properties on the basis that Saman was the deceased's legitimate son. Note that this order was obtained *ex-parte*.

On the 23rd March, 1959 letters of administration were issued to the defendant who was described as the lawful grandson of the deceased.

On the 8th June, 1960, the second plaintiff, acting for the first time on the advice of solicitors, filed a notice of motion for the following orders:—

(i) that letters of administration granted to the (defendant) in Petition No. 273 of 1958 be revoked;

(ii) that the (two plaintiffs), the lawful grand-nephew and great-grand-nephew of the deceased, are the beneficiaries lawfully entitled to share in the estate of Yunus bin Derela, deceased.

Various affidavits were filed in support and against this motion.

On the 9th July, 1960, the motion came up for hearing in open Court before Mr. Justice Syed Sheh Barakbah who ordered that as both parties had agreed to proceed with the trial without further pleadings the defendant's solicitors should file an appearance.

On the 19th August, 1961, the matter again came up before Mr. Justice Syed Sheh Barakbah in open Court and he ordered that the application be struck out with costs and without prejudice to the applicant, *viz.* the second plaintiff, bringing a fresh action against the defendant.

On the 11th October, 1961 this suit was filed.

On these facts I do not think that the plaintiffs are precluded from contesting title to the deceased's property.

The several English cases cited to me proceeded on the basis that in England the Probate Court was obliged to grant letters of administration to the nearest next-of-kin and had no power to do so to anybody else, see for example *In re Ivory* [1]. This is quite different from the law applicable in Kedah at the material time. That law is to be found in section 12(iv) of the Kedah Administration of Estates Enactment No. 1, the relevant words of which read:—

"Letters of Administration may be granted to the following:—

....

Where the deceased has died intestate — to any person who according to the law of distribution which applied to the deceased would be entitled to all or any part of the deceased's estate: or if good cause be shewn to the Court, to a creditor of the deceased or to any other person who in the opinion of the Court is suitable."

Here it is quite clear that the Court had power to grant letters of administration to a person who was not a beneficiary if the Court thought he was suitable. The fact that the learned Assistant Registrar granted the letters of administration to the defendant does not necessarily mean that when he made the grant he had made a definite finding that the two plaintiffs were not beneficiaries as it was open to him to grant such letters to the defendant even if he was not a beneficiary.

The two plaintiffs opposed the defendant's application on the ground that the defendant was not entitled to a share in the estate. This was a proper ground under section 28 of the Administration of Estates Enactment No. 1. It is true that under section 27 thereof when on the date fixed for hearing of the petition the two plaintiffs appeared and opposed the application the proceedings took, as near as may be, the form of a suit in which the defendant was the plaintiff and the two plaintiffs were the defendants. But nevertheless as the record made by the learned Assistant Registrar did not disclose any finding of fact on the point contested it is, in my view, open to me to infer that letters of administration were granted by him to the defendant not necessarily because he thought that the defendant was or was not entitled to a share in the estate but because in exercise of his discretion under section 12(iv) he thought that the defendant was a suitable person to be granted such letters of administration.

Also, section 41(2) of the Evidence Ordinance, No. 11 of 1950 provides that a final judgment order or decree of a competent Court in the exercise of probate jurisdiction "is conclusive proof —

(a) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

(b) that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person."

In *Woodroffe and Ameer Ali's* Law of Evidence, 10th edition, at page 626, dealing with the corresponding provision of the Indian Evidence Act, the following passage appears —

"The grant of letters of administration so long as it subsists is conclusive evidence as regards.....the legal character conferred on the administrator.

A grant of letters of administration with the will annexed does not make any question as to the title to property covered by, or as to the construction of the will, *res judicata* in a subsequent suit in which such title or construction comes in issue.

The grant of letters of administration is decisive only of the right of the person to whom the grant is made to represent the estate."

The learned authors refer to a number of cases in the foot-note as authority for the above propositions but I regret that I have no access to these reports. However applying the principle enunciated above I hold that the grant of letters of administration to the defendant did not preclude me from adjudicating on the title of the different contestants to the deceased's estate.

As to the order of Hill J. made on 4th February, 1959, distributing the estate on the basis that Saman was the deceased's legitimate

son, I am of the opinion that as it was obtained *ex parte*, without the plaintiffs' knowledge and so denying to them the opportunity of putting forward their own claim, it does not preclude them from asserting their title in this suit.

As to the principal question, the evidence as one might expect is conflicting. However giving it the best consideration I can, I have come to the following conclusion.

Banu had two sons, Jusoh bin Banu and Derela bin Banu. Taking the descendants of Jusoh bin Banu first, he had two sons, Dollah bin Jusoh and Hashim bin Jusoh. Dollah had a son, Che Tam the first plaintiff, while Hashim had a son, Salleh whose son is Puteh the second plaintiff. As regards the descendants of Derela bin Banu (the other son of Banu), he had a son, Yunus bin Derela, the deceased, and a daughter, Munah binti Derela. As to the principal question in dispute, I find it proved by the plaintiffs that Saman was not the deceased's son but the son of Munah born out of wedlock and his father was Yunus bin Demanis. Saman was born in Sik. His mother brought him to live with her brother at Telok Durian. She then married Mat Arshad from Sik, returned to Sik and to her and him were born Che Mah (DW4) and several children. To give an idea of the ages of the different parties, at the time of the trial Che Mah was 53.

Yunus bin Derela the deceased, had himself been married to one Mek Bu, but only for a few months and he died childless. He brought up Saman.

Munah died. Then Yunus died on 28th November, 1931. He left two pieces of land owned wholly by him and a third in which he was co-owner with two others Hawa (PW4) and Ahmad (PW5). During his life-time he occupied these lands. It is not clear whether he occupied all or only some of them; probably not the third piece. After his death Saman, then aged 17 or 18, occupied them. Salleh, the second plaintiff's father, disputed Saman's right to the lands. The kampong elders were asked to arbitrate and a meeting was held at which were present Saman, Salleh, Awang Besar (PW3) at some stage a ketua of the kampong, Haji Awang since deceased and the second plaintiff then a mere child. Salleh insisted that he, not Saman, was entitled to the lands. The elders decided that Salleh was and Saman was not entitled to them. Saman handed over the titled deeds (probably only two of them, as the third was in the hands of the co-owners) to Salleh, Saman himself remaining on the lands until Salleh applied for letters of administration. Saman handed over the titles because he knew he had no right to the lands. Salleh then occupied the lands for 2 years and 8 months. Salleh died without having applied for letters of administration. The titles passed into the hands of his son, the second plaintiff. Then Saman himself died. On 30th November, 1958 letters of administration were granted to the defendant as the deceased's grandson (when in fact he was not, being Munah's grandson), he got into possession of these lands and has been in possession ever since.

I find that Saman was Munah's illegitimate son for the following reasons:—

(a) Awang Besar (PW3), an old gentleman of 60, a ketua of the kampong for about four years until the Japanese surrender and related to none of the parties, is the only reliable witness. I believe him when he says that Saman called Yunus "pak teh" (uncle) and Munah "mak" (mother) and Saman admitted at the meeting of the kampong elders that Salleh was a beneficiary and thereafter Saman handed over the deeds to Salleh because he, Saman, knew that the deceased was his uncle.

(b) Haji Abdullah bin Haji Mohamed Nor (DW3) called by the defendant is an equally respectable old gentleman. He is 65 and an Imam of a nearby kampong who also taught theology at the deceased's kampong. I do not place much reliance on his assertion that Saman was the deceased's son because (i) his knowledge is second-hand having been derived mainly from the deceased himself and Saman; (ii) when he first knew the deceased the deceased was already 60 (this was 55 years ago) and he himself was only about 10 and all the time the deceased knew him (extending over a period of 20 years) it was most unlikely that the ancient gentleman would have confided to him, particularly after he had qualified to lead the faithful at prayers and to give religious instructions, the illegitimacy of Saman's birth. In a kampong such matters are not noised abroad; (iii) the Imam cannot be right when he says that Saman called Munah "mak penakan" (aunt) when Che Mah (DW4) one of Munah's daughters says that Saman called Munah "mak ngah" (another expression for aunt). While it is true that many expressions may be used for "aunt", kampong Malays do not vary their terms of address when speaking to the same aunt.

(c) Awang Kechik (DW2) called by the defendant, a relative of the parties, unwittingly revealed during cross-examination that he knew the truth. First, he gave evasive answers. Second, he blurted out that Saman called Munah "mak" (mother), then realising that he had let the cat out of the bag he corrected himself to "mak penakan" which later transpired to be different from Che Mah's evidence already noted above. His demeanour made it clear that he was anxious to side with the defendant.

(d) After the deceased's death Salleh was at some indeterminate time allowed by Saman to get into possession of the deceased's lands and remained in occupation for two years and eight months. This in my view proves that the kampong elders had decided that Salleh, not Saman, was entitled to the deceased's lands, Saman acquiesced in this decision (by handing over first

the deeds and later the lands to Salleh and by doing nothing whatsoever to challenge the elders' decision by, for example, applying to the Land Office for distribution of the deceased's estate) because he knew the truth and that he had a hopeless case.

Inche Jayadeva argues that the evidence called by the plaintiffs and their witnesses on the relationship between the deceased and Saman was hearsay and therefore inadmissible. I allowed the evidence under sections 32(e) and 50(1) of the Evidence Ordinance, No. 11 of 1950 as it is from persons who had special means of knowledge of the relationship of the two persons.

In reaching my conclusion I have not relied in any way on an affidavit sworn by Tok Taha, an old gentleman aged 106 who was prevented by extreme age and illness to attend this trial, and filed in my Court in another matter related to this action.

In view of the above conclusions, I declare that:—

(a) the first plaintiff is the lawful great-nephew and the second plaintiff is the lawful great-grand nephew of Yunus bin Derela, the deceased.

(b) the defendant, Wateh bin Saman and the other children of Saman, namely—

Che Pin bin Saman
Ibrahim bin Saman
Dai bin Saman
Saad bin Saman and
Tijah bin Saman

are not the beneficiaries lawfully entitled to share in the estate of the said Yunus bin Derela, deceased, being children of Munah binti Derela, sister of the deceased who had predeceased the said deceased.

The plaintiffs also pray for an injunction, a receiver, inquiries and accounts. I refrain from making any order as to these until I have had an opportunity of hearing counsel further, when I shall also decide on costs.

Order accordingly.

Solicitors: *Lim, Lim & Oon; Jayadeva & Zahir.*

LIM CHIAM NEO v. TAN SEE TIAM

[O.C.J. (Ismail Khan J.) January 23, 1963]

[Malacca — Civil Suit No. 62 of 1961]

Landlord and Tenant — Recovery of possession — Order of trial judge granting possession — Order approved by both parties dated and entered post dated — Application to set aside Order on various grounds — Whether trial judge has jurisdiction — Control of Rent Ordinance, 1956, s.12(1).

In an action by the plaintiff for recovery of possession an order was made by the trial judge on June 18, 1962 for possession, rent in arrear, mesne profits and costs. Plaintiff's solicitors drew up the order so made and it was approved by the defendant's solicitors on July 31, 1962 but was dated and entered August 1, 1962. Notice of appeal was filed on July 17, 1962 and the defendant's new solicitors filed notice of motion to set aside the order made on June 18, 1962 for various reasons, one of them being that the order was a nullity and ought to be set aside. On October 13, 1962 the defendant's solicitors filed notice of withdrawal of appeal but submitted that the order ought to be set aside as a nullity on the following grounds: (i) the notice to quit was invalid as the effective date when the rent fell due was not stated therein; (ii) even if the notice to quit was valid the acceptance of part payment of arrears of rent created a fresh tenancy; (iii) that the order or judgment should not have been made unless the conditions specified in section 12(1) of the Control of Rent Ordinance were fulfilled.

Held: (1) it is not necessary in determining a tenancy to state expressly in the notice to quit the effective date when the rent falls due;

(2) the fact that rent was in arrear for more than 14 days entitled the plaintiff to an order for possession under section 12(1)(a) of the Control of Rent Ordinance;

(3) it was for the Court of Appeal to correct any errors or irregularities in the order of the trial judge as the trial judge had no jurisdiction to do so after judgment had been pronounced.

Case referred to:—

(1) *Fieldrank Ltd.* v. *E. Stein* [1961] 1 W.L.R. 1287.

ACTION.

H. B. Ball for the plaintiff.

F. Keith Sellar for the defendant.

Cur. Adv. Vult.

Ismail Khan J.: This was an action by a landlord to recover possession of rent-controlled premises from a tenant. Both parties were at all times represented by advocates and solicitors.

On 18th June, 1962, upon a motion for judgment by counsel on behalf of the plaintiff, I made an order for possession, rent in arrear, mesne profits and costs. The order so made was drawn up by the plaintiff's solicitors on 31st July, 1962, and approved by the defendant's solicitor on the same day. It was thereupon dated and entered 1st August, 1962, which date appears to be an error since judgment was pronounced by me on 18th June, 1962, and I had then made no order for post-dating — see Rules of the Supreme Court, Order 41 rule 3 and Form 10 in Appendix F.

A notice of appeal was filed on 17th July, 1962. On 12th September, 1962, the defendant filed a notice of change of solicitors and on 17th September, 1962, his present solicitors filed notice of motion to set aside the order of 18th June, 1962, for various reasons which have been set out at considerable length. One of the grounds was that the order of 18th June, 1962, was a nullity and ought to be set aside. On 13th October, 1962, the defendant's solicitors filed notice of withdrawal of appeal.

Now although the plaintiff rested her claim to repossession on two grounds, it was sufficient for her purpose to prove only one of them in order that the Court may make an order under section 12(1) of the Control of Rent Ordinance, 1956. In the event, it was necessary in my view to consider only the ground set out in paragraph (a) that rent lawfully due had been in arrear for more than fourteen days.